Supreme Court, U.S.
FILED
JAN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-918

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STEVEN K. SMITH, individually
and as a general partner of
SMITH & SMITH,
Appellant,

v.

FLORIDA DEPARTMENT OF BUSINESS
REGULATION, DIVISION OF LAND
SALES, CONDOMINIUMS AND
MOBILE HOMES,
Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

MOTION OF APPELLEE TO DISMISS (or AFFIRM)

W. Douglas Moody, Jr.
Department of Business
Regulation
725 South Bronough Street
Tallahassee, FL 32399-1007
(904) 488-7365

Attorney for Appellee

BEST AVAILABLE COPY

28 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. WHETHER THE CONSTRUCTION OF SECTION 721.17, FLORIDA STATUTES (1981) BY THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA IS A BASIS FOR REVIEW BY THE UNITED STATES SUPREME COURT.

II. WHETHER SECTION 721.17, FLORIDA STATUTES (1981) PROVIDED NOTICE THAT IT APPLIED TO THE TRANSFER OF A TIME SHARE SELLER'S INTEREST.

PARTIES TO PROCEEDINGS BELOW

1. Original parties appearing before the Florida Department of Administrative Hearings was the Florida Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, Petitioner below and Appellee herein; Steven K. Smith, individually and as general partner of Smith & Smith, Respondents below and Appellant herein.

2. A Final Order by the Department was entered finding violations by Smith which was appealed to the First District Court of Appeal of Florida by Steven K. Smith individually and as general partner of Smith & Smith as Appellant and the Florida

Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes as Appellee.

3. The Florida First District Court of Appeal upheld the Final Order and jurisdiction was sought in the Florida Supreme Court by Smith as Appellant, which was denied. The Florida Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes appeared as Appellee.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties to proceedings below	ii
Table of Authorities	v
Statutory Provisions Involved	2
Statement of the Case.....	6
Arguments	
I. Construction of a state statute by a state court does not invoke the jurisdiction of the United States Supreme Court.	8-12
II. The language of the Section 721.17, Florida Statutes (1981) properly informed third party purchasers that they were to assume	12-19

certain responsibilities
when the time-share interest
of a seller was transferred
to them.

Conclusion 20

TABLE OF AUTHORITIES

CASES	PAGE(S)
U.S. SUPREME COURT	
Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982)	17
Hortonville Joint School Dist. No.1 v. Hortonville Ed. Ass'n., 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976)	9
U.S. v. Thirty-seven (37) photographs, 402, U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822; Reh.Den. 403 U.S. 924, 91 S.Ct. 221, 29 L.Ed.2d 702 (1971)	9
FLORIDA	
Nat. Merchandise v. United Serv. Auto Ass'n., 400 So.2d 526 (Fla. 1st DCA 1981)	16
Southern Crane Rentals v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983)	16
Smith v. Dept. of Business Regulation, 504 So.2d 1285 (Fla. 1st DCA 1986)	12
Wilcox v. Atkins, 213 So.2d 879 (Fla. 2nd DCA 1978)	16

STATUTES	PAGE(S)
Florida Statutes	
Chapter 721	11, 15, 17, 18
721.05(5) (1981)	2
721.05(9) (1981)	3
721.05(12) (1981)	3
721.17 (1981)	3, 4, 5, 8, 10, 12 13, 14 15, 17 18
721.17 (1983)	8, 9, 10

No. 87-918

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STEVEN K. SMITH, individually
and as a general partner of
SMITH & SMITH,
Appellant,

v.

FLORIDA DEPARTMENT OF BUSINESS
REGULATION, DIVISION OF LAND
SALES, CONDOMINIUMS AND
MOBILE HOMES,
Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

MOTION OF APPELLEE TO DISMISS
(or AFFIRM)

Pursuant to Rule 16.1, Appellee, the Florida Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes moves to dismiss the appeal

filed on behalf of Steven K. Smith, individually and as a general partner of Smith & Smith (hereinafter "Smith"). The motion is grounded on the fact that the decision by the Florida District Court of Appeal was based on a state court's construction of state law and that no substantial federal question is presented for review by this Court. Smith therefore has no standing to invoke this Court's appeal jurisdiction.

STATUTORY PROVISION INVOLVED

"Developer" means the person creating a time sharing plan. Section 721.05(5), Florida Statutes (1981).

"Offer to sell," "offer for sale," offered for sale," or "offer" means solicitation of purchasers, the taking of reservations, or

any other method whereby a purchaser is offered the opportunity to participate in a time-sharing plan, Section 721.05(9), Florida Statutes (1981).

"Seller" means any developer or any other person, or agent or employee thereof, who is offering time share periods for sale to the public in the ordinary course of business, except a person who has acquired a time share period for his own occupancy and later offers it for resale. Section 721.05(12), Florida Statutes (1981).

No seller shall sell, lease, assign, mortgage, or otherwise transfer the seller's interest in the accommodations or facilities of a time sharing plan to a third party, unless:

(1) The third party agrees in writing to honor fully the rights of the

purchasers of the time sharing plan to occupy and use the accommodations or facilities.

(2) The third party agrees in writing to honor fully the rights of purchasers of the time sharing plan to cancel their contracts and receive appropriate refunds, as provided in this chapter.

(3) The third party agrees in writing to comply with the provisions of this chapter for as long as the third party continues to sell the time sharing plan or for as long as purchasers of the time sharing plan are entitled to occupy the accommodations or use the facilities, whichever is longer in time.

(4) The third party agrees to assume all obligations of the seller to purchasers.

(5) Notice is mailed to each purchaser of the time sharing plan affected thereby within thirty days of the sale, lease, assignment, or other transfer.

Persons who hold mortgages on the property constituting a time sharing plan before the public offering statement of such plan is approved by the Division shall not be considered third parties for the purposes of this section. Section 721.17, Florida Statutes (1981).

STATEMENT OF THE CASE

While Appellant Smith's statement of the case is substantially correct, one important area has been glossed over in the Division's opinion. Rather than restating the case, the Division will point out that area.

Initially it should be noted that while Smith had never been involved in a right to use time-share project prior to the Beach Club project, it is important to point out that Smith had in fact had been involved in numerous other time-share estate projects prior to the Daytona Sands project. Also, Appellant suggests that Steve Smith's relationship with the Beach Club as simply that of a "financier" providing financing. While this was Appellant's position in the tribunal below,

it is apparent from the reading of the Final Order that the hearing officer completely and totally rejected this argument. In fact, the hearing officer in his Recommended Order acknowledged that this was Smith's position and rejected it.

Therefore, it would be more accurate to state that all references in Appellant's statement of the facts to such a financing arrangement should be characterized as allegations by Appellant, which allegations below were rejected. As previously noted and as found by the hearing officer, the document between Smith and the Beach Club specifically provided that Smith was acquiring an interest in the time-share units rather than merely "paper".

ARGUMENTS

I. Construction of a state statute by a state court does not invoke the jurisdiction of the United States Supreme Court.

Smith argues that its liability under Section 721.17, Florida Statutes (1981) was pursuant to an invalid retroactive application of Section 721.17, Florida Statutes (1983). The opinion by the First District Court of Appeal of Florida, which is at issue, found Smith's liability pursuant to the 1981 statute. the 1983 version of Section 721.17, Florida Statutes was only utilized by the First District Court of appeal to support its conclusion that the legislative intent of the 1981 version of Section 721.17, Florida Statutes

was to require third party purchasers such as Smith to assume the liabilities along with all assets received.

Smith now wishes this Court to construe Section 721.17, Florida Statutes (1983) as retroactively applied. This Court lacks jurisdiction authoritatively to construe state legislation. U.S. v. Thirty-seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822; Reh. Den. 403 U.S. 924, 91 S.Ct. 221, 29 L.Ed.2d 702 (1971). Further, this Court has stated that it is bound to accept interpretations of state law concerning the interpretation of that state's law by one of its courts. Hortonville Joint School Dist. No.1 v. Hortonville Ed. Ass'n., 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976).

The issue raised by Smith concerning an invalid retroactive application of Section 721.17, Florida Statutes (1983) rather than applying the 1981 version of Section 721.17, Florida Statutes has no basis in fact. It ignores the opinion of the First District Court of Appeal of Florida which stated that it did not retroactively apply the 1983 act but merely interpreted and construed the 1981 version of Section 721.17, Florida Statutes. Construction of a state statute by a state court does not involve the jurisdiction of this Court.

Smith's third argument is that the 1981 statute was arbitrarily expanded by the First District Court of Appeals. The First District acknowledged that the 1983 version of Section 721.17, Florida Statutes was more artfully worded that the 1981

version. They concluded however, that the legislative intent in the 1981 act was consistent with the 1983 version. Smith was a sophisticated time share investor who had been involved in previous time share investments. His involvement had developed to the extent that the contract utilized in the purchase was drafted by him. He was familiar with Chapter 721, Florida Statutes, and as stated by the First District had he read it in its entirety, he would have realized that he was to assume certain obligations upon purchasing the interests of the seller. Smith's argument becomes more tenuous in light of the agreement entered into which stated that the agreement would comply with all statutes governing its activities. Concerning that particular portion of the agreement, the First District stated as follows:

> Ironically, on page 7 of the Agreement under Partnership Obligations (a), the Agreement states that appellant "will comply with all rules and regulations of any real estate commission and other governmental agencies in all states relating to the advertising and sales of real properties and shall comply with all statutes... governing its sales activities". (Emphasis in Original). Smith v. Department of Business Regulation, 504 So.2d 1285 (Fla. 1st D.C.A. 1986).

The First District's opinion therefore did not arbitrarily expand Section 721.17, Florida Statutes (1981) but merely construed the statute to effectuate the legislative intent and did no more than what Smith agreed to do within the contract.

II. The language of Section 721.17 (1981) properly informed third party purchasers that they were to assume certain responsibilities when the time share

interest of a seller was transferred to them.

The 1981 version of Section 721.17 states that a seller shall not transfer his interest in a time share project without acquiring certain assurances from the third party purchaser.

Smith, as a third-party purchaser argues that the statute failed to provide him with a reasonable opportunity to know that acceptance of the sales contracts without written guarantees was a prohibited act and it would result in a civil penalty being assessed against Smith as the third party purchaser.

Section 721.17, Florida Statutes (1981), is worded to require that the third party purchaser who received the seller's

interest must assume certain obligations. It is equally apparent that if these obligations were not assumed by the third party purchaser, any contract transferring the interest of the original seller would have been in violation of Section 721.17, Florida Statutes (1981).

The pertinent issue before this court is not whether there is notice of the potential for a civil penalty against third party purchasers if the provisions of Section 721.17, Florida Statutes (1981) were not included in the act but whether a third party purchaser was put on notice upon reading Section 721.17, Florida Statutes (1981) that they were to assume certain responsibilities upon the seller transferring its interests to that third party purchaser. The 1981 version of Section 721.17, Florida Statutes provided

sufficient notice.

Smith attempts to avoid the responsibility of the 1981 version of Section 721.17, Florida Statues even though he was a sophisticated investor in time-sharing. Smith was the drafter of the contract used, stated in the contract that the agreement was to comply with all appropriate statutes, and that the contract was to be construed in accordance with the laws of Florida. Smith was familiar with Chapter 721 generally and had he read it, would have realized his responsibilities under Section 721.17, Florida Statutes (1981).

There is no substantial federal question before this court because this matter was properly resolved by the First District pursuant to Florida Law. Under

Florida law, contracts are made in legal contemplation of existing applicable law. Southern Crane Rentals v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983). In Florida, the law of a state is a basic ingredient of every contract and forms a part of that contract as if it were expressed or referred to in its terms. Nat. Merchandise v. United Serv. Auto. Ass'n., 400 So.2d 526 (Fla. 1st DCA 1981).

Further, Florida law provides that a contract includes not only that which is written but also terms and matters which, through not actually expressed, are applied by law, and these are as binding as the terms which are actually written. Wilcox v. Atkins, 213 So. 2d 879 (Fla. 2d DCA 1978).

The fallacy in Smith's argument is not only that he was the drafter of the contract but that he also was aware that the Division regulated the time share industry and of Chapter 721 because of his prior involvement in time sharing in Florida. He had the opportunity and was expected to consult relevant legislation in advance of entering into the contract. See, Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982). After however, drafting the contract, executing it, modifying it three months later, and being a sophisticated time-sharing investor, he now wishes to assert that the protections placed in Chapter 721 should not be applicable to him.

Smith is being required to do no more than what would have occurred had he complied with 721.17, Florida Statutes

(1981). He had established a procedure for receiving payments from purchasers of time share weeks and was to receive additional monies as weeks were sold. Had this project been completely developed, he would have had the opportunity to reap all of the benefits without any exposure to the potential liability, even though he was the seller of the project and had certain obligations and responsibilities under Section 721.17, Florida Statutes. As a seller, he should receive proceeds from a sale, however, he should be equally responsible for all associated liabilities. Any other construction would frustrate the intent of Chapter 721 in general and Section 721.17, Florida Statutes, in particular.

Under Florida case law, Smith was on constructive notice that if he did not

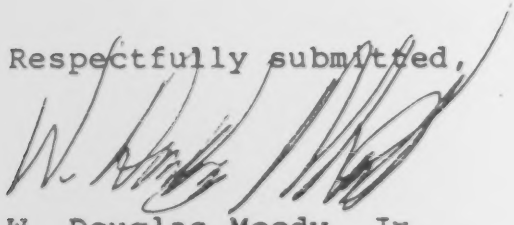
include all provisions within the contract that should have been included, those provisions were still considered part and parcel of the contract. Under Florida law, he was made responsible for and obligated to the time-share purchasers because based on the transaction occurred, he was to assume those obligations and responsibilities.

This case was adequately addressed by the First District Court of Appeal of Florida utilizing state law. No substantial federal question has been presented before this court to invoke its jurisdiction.

CONCLUSION

For the foregoing reasons Appellee, the Florida Department of Business Regulation, Division of Land Sales, Condominiums and Mobile Homes requests that this Court dismiss the appeal of Appellant Smith or in the alternative, affirm the decision of the First District Court of Appeal.

Respectfully submitted,



W. Douglas Moody, Jr.
Staff Attorney
Department of Business
Regulation
725 South Bronough Street
Tallahassee, FL 32399-1007
Counsel for Appellee